

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

KAYLA KOETHER, in her individual capacity as the Democratic Nominee for the Iowa House of Representatives District 55,

Plaintiff,

vs.

PAUL PATE in official capacity as Iowa Secretary of State; BENJAMIN STEINES in his official capacity as County Auditor for Winneshiek County, Iowa,

Defendants.

Case No. EQCE083821

MOTION TO DISMISS

COMES NOW, Defendants Iowa Secretary of State Paul Pate and Winneshiek County Auditor Benjamin Steines pursuant to Iowa Rule of Civil Procedure 1.421 and requests that the Plaintiff's Petition of November 29, 2018, be dismissed for lack of subject matter jurisdiction.

MOTION TO DISMISS STANDARD

Iowa Rule of Civil Procedure 1.421(1)(a) states that lack of subject matter jurisdiction may be raised by a pre-answer motion to dismiss. "Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the court's attention." *Schott v. Schott*, 744 N.W.2d 85, 87 (Iowa 2008). Lack of subject matter jurisdiction can be raised "at any time." *Klinge v. Bentien*, 725 N.W.2d 13, 16 (Iowa 2006).

Courts have a duty to refuse to decide controversies that are not properly before them.

Campbell v. Iowa Beer & Liquor Control Dep't, 366 N.W.2d 574, 576 (Iowa 1985).

DISCUSSION

Plaintiff filed her Petition on November 29, 2018, asking this court for three points of relief. First, she asked this court to temporarily enjoin the Secretary of State from certifying the canvass results of the election for Iowa House District 55 at the state canvass of elections on December 3, 2018. Second, she asked this court for a writ of mandamus directing the Winneshiek County auditor to obtain from the United States Postal Service information contained in barcodes sprayed on absentee ballot return envelopes showing when those envelopes entered the postal mail stream. Third, the Plaintiff requested a writ of mandamus ordering the Winneshiek County auditor to count all the ballots that were determined to have entered the postal mail stream on or before November 5, 2018.

This court held a hearing on the Plaintiff's motion for temporary injunction on November 30. On December 3, the court entered an order denying the Plaintiff's motion to enjoin the state canvass of election results. The state canvass board met on December 3, and Michael Bergan was certified as the winning of House District 55.

In addition, the court ordered the Winneshiek County Auditor to work with the United States Postal Service to determine if barcodes sprayed on absentee ballot return envelopes could be read and provide information about when those absentee ballots were mailed. The Winneshiek County Auditor reported to the court on December 5 that twenty-nine of thirty-three ballots in question were in the mail on November 5 as required by Iowa

Code section 53.17. Report to Court ¶2. One ballot entered the postal system on November 6, and no information could be determined from the remaining three envelopes. *Id.*

Thus, two of the three counts in the Petition have been resolved conclusively. The state canvass of elections was held and a winner in House District 55 has been certified. The date of entry into the postal system has been determined for thirty of the thirty-three ballots, and all the ballots have been preserved and marked with individual exhibit numbers as ordered by the court.

This court lacks jurisdiction to resolve the third count of Plaintiff's Petition. Plaintiff's third count asks this court to order that the twenty-nine ballots that were mailed and recorded by the United States Postal Service before November 6 be counted by the Winneshiek County Auditor. However, the Winneshiek County canvass has been held, its results reported to the Secretary of State, and the outcome of the House District 55 election has been certified by the state canvass board. Iowa Code chapters 57 and 59 are the exclusive remedy for a candidate seeking to contest the result of an election for a seat in the General Assembly. Indeed, grounds for a contest include "that illegal votes have been received or legal votes rejected," Iowa Code § 57.1(2)(e), or "any error in any board of canvassers in counting the votes." Iowa Code § 57.1(2)(f). These grounds are at the heart of the Plaintiff's argument to count ballots not counted at the time of the Winneshiek County canvass because the ballot return envelopes lacked a postmark and Intelligent Mail Barcode. Indeed, this court's Order denying Plaintiff's request for a temporary injunction recognized that the Plaintiff's remedy to challenge the certification of the election is to

contest the election in the House of Representatives pursuant to Iowa Code chapters 57 and 59.

WHEREFORE, Defendants Secretary of State Paul Pate and Winneshiek County Auditor Benjamin Steines request that the Petition be dismissed. Further, Defendants request that this Motion be heard at the hearing previously scheduled by the court for December 20, 2018.

Respectfully submitted,

THOMAS J. MILLER
ATTORNEY GENERAL OF IOWA

/s/ Matthew L. Gannon

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